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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR-07-0645 MMC

Plaintiff,

**AMENDED* ORDER AFFORDING
DEFENDANT OPPORTUNITY TO
AMEND OR WITHDRAW MOTION**

v.

MICHAEL JOSEPH SILVA,

Defendant.

Before the Court is defendant Michael Joseph Silva's ("Silva") "Motion for Guilty Plea Withdrawal After Sentencing (Fair and Just Reason)," filed December 29, 2008, by which Silva challenges the sentence imposed upon him by this Court. The proper motion to challenge a sentence in the sentencing court is a motion filed under 28 U.S.C. § 2255. See 28 U.S.C. § 2255. A court, however, may recharacterize a pro se litigant's motion "in order to avoid unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a pro se motion's claim and its underlying legal basis." See Castro v. United States, 540 U.S. 375, 381-82 (2003) (internal citations omitted). Here, the Court intends to

*The sole purpose of the amendment is to extend the deadline for Silva to respond to the instant order, in light of the original order having been returned to the Clerk's Office as undeliverable at Silva's then address of record.


1 recharacterize Silva's motion as a motion filed under § 2255.

2 Such recharacterization, however, would "mean[] that any subsequent § 2255
3 motion will be subject to the restrictions on second or successive motions" filed under
4 § 2255. See Castro, 540 U.S. at 383 (internal quotation omitted); see also 28 U.S.C. §
5 2255(h) (providing "second or successive" § 2255 motions must be certified by appellate
6 panel as containing newly discovered evidence or new rule of constitutional law).

7 Under such circumstances, the Court will afford Silva an opportunity to amend his
8 motion "so that it contains all the § 2255 claims he believes he has," or, in the alternative,
9 he may withdraw the motion. See Castro, 540 U.S. at 382. Any amended motion or notice
10 of withdrawal shall be filed no later than May 15, 2009.

11
12 **IT IS SO ORDERED.**

13
14 Dated: April 9, 2009


MAXINE M. CHESNEY
United States District Judge